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In the

Supreme Court of the United States

OCTOBER TERM, 1984

No.

DAVID CERRI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

May federal agents, consistent with the Fourth Amendment conduct a nighttime raid of the private home of a federally licensed firearm dealer—a place distant from his licensed business premises—and conduct a search and seize evidence when such search was without a warrant, was not incident to an arrest, was without consent and no exigent circumstances existed?

Can the Court of Appeals for the Seventh Circuit carve out a new and radical departure from the warrant requirement of *Payton* v. *New York*, 445 U.S. 537 (1980) to allow federal criminal investigators to enter and search a citizen's home for records on the basis that he has a federal firearm license at a different location and that they are "certain" that he has violated the firearms laws in his home?

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No.

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INTRODUCTION

TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May it please the Court:

David Cerri respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The January 11, 1985 opinion of the United States Seventh Circuit Court of Appeals (jurisdiction conferred by 28 U.S.C. § 1291), affirming Petitioner's firearms convictions and one year prison sentence (failure to comply with a reporting requirement (18 U.S.C. § 922(b)(5); sale or delivery

of a firearm in violation of state law (18 U.S.C. § 922(b)(5)) pursuant to Mr. Cerri's conditional plea of guilty under federal Rule of Criminal Procedure 11(a)(2) in the United States District Court, Northern District of Illinois, Eastern Division (83 CR 206) is appended hereto as Appendix A, *United States* v. *Cerri*, __ F.2d __ (Seventh Cir., No. 84-1564, January 11, 1985). The district court's Opinion is appended hereto as Appendix B.

STATEMENT OF JURISDICTION

This Petition is timely filed (Rev. Rules of the Supreme Court of the United States, Rule 20) within 60 days from the date of the judgment sought to be reviewed.

Jurisdiction is conferred by Title 28, United States Code, Section 1241.

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISION INVOLVED

Federal Firearms provisions of the Criminal Code 18 U.S.C. § 921 *et seq.*

SECTION 921. *Definitions.*

(a) As used in this chapter—

* * *

(11) The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at

wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

* * *

SECTION 923. *Licensing*

(a) No person shall engage in business as a firearms . . . dealer until he has filed an application with, and received a license to do so from, the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business . . .

* * *

(c) Upon the filing of a proper application and payment of the prescribed fee, the Secretary shall issue to a qualified applicant the appropriate license which, subject to the provisions of this chapter and other applicable provisions of law, shall entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce during the period stated in the license.

(d)(1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

* * *

(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter . . .

* * *

(g) Each . . . licensed dealer . . . maintain such records of important, production, shipment, receipt, sale, or other disposition, of firearms and ammunition except .22 caliber rimfire ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe. Such . . . dealers . . . shall make such records available for inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Secretary may enter during business hours and premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept by such . . . dealer . . . under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises.

* * *

(h) Licenses issued under the provisions of subsection (c) of this section shall be kept posted and kept available for inspection on the premises covered by the license.

STATEMENT OF THE CASE

Federal Jurisdiction and Procedural History

A federal grand jury returned a twelve-count indictment charging David Cerri as a federally licensed firearm dealer with nine separate violations of the record keeping requirements of 18 U.S.C. § 923 (Title 18, U.S.C. 922(b)(5)) in connection with three separate sales or deliveries of handguns in violation of state law (Title 18, U.S.C. 922(b)(2); Illinois Criminal Code, *Ill.Rev.Stat.*, Ch. 38, § 83-3(a) and City of Chicago Ordinance 11.1-4). Mr. Cerri filed a motion to suppress records and firearms seized in a search of his home (not his licensed firearm business premises). The district court

held an evidentiary hearing, but denied the motion in an Opinion, appended here as Appendix B.

Thereafter, Mr. Cerri entered a conditional plea of guilty under Rule 11(a)(2) to Counts One and Twelve of the indictment alleging single violations of Sections 922(b)(2) and 922(b)(5) to Title 18 of the United States Code. (The government dismissed the balance of the indictment). The Court sentenced Mr. Cerri to prison for one year and one day on Count One and five years probation plus a $1,000 fine on Count Twelve.

Having preserved the right to appeal the district court's denial of his motion to suppress, Mr. Cerri's case was reviewed by the Seventh Circuit Court of Appeals which found the search and seizure was lawful. From that decision this certiorari petition is filed.

Facts

Introduction

The home of David Cerri was entered at night by an ATF raiding party who searched without a warrant or consent and absent exigency; though making no arrest, found and seized records and inventory. Mr. Cerri's registered firearm premises was at a different location, distant from his home.

Ronald McKenzie, an agent with the Treasury Department's Bureau of Alcohol, Tobacco and Firearms, was the sole witness at the suppression hearing (R. 9; "R" refers to the record pages from the seventy-page transcript of proceedings). At all times and in every respect from November of 1981 through January of 1982, Ronald McKenzie operated as a felony criminal investigator of David Cerri. (R. 40-41) As an undercover agent McKenzie performed no duties whatsoever in connection with the inspection of businesses (such as Mr. Cerri's) licensed under the Federal Firearms Statute (18 U.S.C. § 921 *et seq.*, Gun Control Act of 1968). (R. 41) Civil administrative compliance with the recording provisions Gun Control Act, by licensed firearms dealers, was of

no concern to Agent McKenzie. (R. 55, 57-58, 65). Accordingly, Ronald McKenzie never visited, inspected, nor viewed David Cerri's 4604 North Ozark Avenue licensed business premises in Norridge, Illinois. (R. 41) McKenzie took no steps to inspect David Cerri's books and records during normal business hours; nor did McKenzie ever make an on-site inspection of David Cerri's inventory at Mr. Cerri's licensed business premises to check on compliance with the record keeping requirements of the Federal Firearms Statute. (R. 55, 66).

In the late night hours of November 13, 1981, past midnight to the early hours of November 14th, the A.F.T. Criminal investigator using "Mac" as his alias met with David Cerri at a parking lot outside a Chicago nightspot. (R. 10-11) According to McKenzie, he purchased two handguns from David Cerri. (R. 11-12). McKenzie did not show Mr. Cerri proper identification at the time of the transfer nor were appropriate forms prepared by Mr. Cerri (R. 12) who sold the handguns out of his car. Following the events of November 14, 1981 McKenzie neither arrested the defendant nor inspected defendant's firearms records at defendant's licensed business premises. (R. 40-41).

A month later, on December 17, 1981, McKenzie, still posing as "Mac," arranged a second meeting with David Cerri again outside defendant's licensed business premises. According to McKenzie, he purchased seven handguns from Mr. Cerri. (R. 16) Again, McKenzie neither placed Mr. Cerri under arrest nor did he take any steps to conduct an inspection at Cerri's registered firearms business premises (R. 40-41). Further, warrants to search or arrest were not obtained. (R. 40).

On January 22, 1982, McKenzie while still working undercover in his criminal investigation of David Cerri arranged to meet Mr. Cerri a third time outside defendant's licensed business premises. In the nighttime hours on January 22nd, McKenzie met David Cerri at 6:00 p.m. at defendant's residential apartment, his home, at 4124 North

Ottawa, Norridge, Illinois. (R. 25-26). After Mr. Cerri told McKenzie what he had for sale, indicating he had just received a shipment of handguns to his firearms business address at 4604 North Ozark Avenue and after Mr. Cerri showed Mac an invoice of Mr. Cerri's stock and several samples of handguns, no sale was made (R. 27). Instead, Mr. McKenzie left Mr. Cerri's home, ostensibly to get money to pay for the firearms and to get a list of customers to see how many he might need, though actually to get the raiding party (R. 34-35).

When McKenzie and the raiding party returned to the Cerri home, Mr. Cerri was not arrested (R. 40). Instead, without a warrant, federal officers went through Cerri's house, seized all guns and records found there and took them away (R. 35-36). The residence was not David Cerri's federally licensed gun dealership premises (R. 51).

REASONS WHY CERTIORARI SHOULD BE GRANTED

The Seventh Circuit in the opinion in this case admits the issue is novel and could find no case similar (p. 3 of Opinion *United States* v. *Cerri*, Appendix).

By its opinion the Seventh Circuit has created a radical and unacceptable and inconsistent departure from this Court's holding in *Payton* v. *New York*, 445 U.S. 537 (1980).

This opinion if left to stand, allows federal agents to conduct a nighttime raid of the private home of a federally licensed firearms dealer (which is not his business premises) and seize evidence therein although they had no warrant, no consent, no exigent circumstances and as no arrest took place—the seizure was not incident to an arrest.

No opinion of this court has granted such sweeping authority to federal agents.

ARGUMENT

In *Camara* v. *Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), Mr. Justice White, speaking for the court reiterated the rule recognized as the starting point for analyzing cases of this kind. It is the most basic principal of Fourth Amendment law which gives concrete expression to the right of citizens to be free, to be secure in their property, to be protected in their homes from police intrusion into their expectation of privacy:

> One governing principal justified by history and its current experience, has consistently been followed: except in certain *carefully defined* classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant. (387 U.S. 528-529, emphasis added)

When an individual's right to freedom, safety, security and privacy in his home must yield to a police search, as a rule, that license to search is to be decided by a judge or magistrate, not by a policeman or a government law enforcement agent. Here, David Cerri's personal rights under the Fourth Amendment were made to yield to A.T.F. criminal investigator Ronald McKenzie on January 22, 1982, by a warrantless search and seizure of defendant's property from his home under circumstances which provide no legal justification for the governmental intrusion on grounds constitutional, statutory or administrative.

Nevertheless, the Seventh Circuit has ruled in this case involving the search of a home that so long as the investigators are "certain" or have "certitude" that the suspect is a federally licensed firearm dealer selling guns out of his home

and not his licensed premises, the authorities may search his home for records and contraband. The court's reasoning is:

> "The [ ] thing that gives us slight pause is the question of how much *certitude*[1] the agents must have that the premises they are entering, though not listed on the dealer's license as his place of business, really are such. If probable cause to believe that they are business premises is ground enough for federal agents to enter a gun dealer's home without a warrant, then Section 923(g) makes even greater inroads into the privacy of people engaged in the gun business than the Supreme Court thought in *Biswell*...We know from...*Payton* v. *New York*, 445 U.S. 573, 589-90 (1980), that the search of a home without a warrant violates the Fourth Amendment...unless there is consent, or an emergency...But these are not questions we need to answer...McKenzie knew...Cerri was selling guns from his home... knew...with *certainty*...So we think the search and seizure was lawful." (See Opinion pp. 4-5, *emphasis* added).

Thus, a new—not so carefully defined—exception to the Fourth Amendment is created...Certitude.

The evidence was not in dispute. The search and seizure took place at David Cerri's home, at night—not at his licensed business premises during normal business hours. On the night in question, undercover criminal investigator McKenzie was searching for contraband or evidence of a crime without a warrant. McKenzie used deception, misrepresentations and a false identity to gain access to defendant's home to discuss the purchase of handguns. David Cerri made no transfer of firearms to agent McKenzie;

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[1]The court conceded "A man does not, simply by going into business as a gun dealer, so far surrender his privacy that the government agents can barge into his home at will on the off chance that he might be storing some guns or business records there." (See Opinion page 3).

no purchase of even a single handgun was made on the night in question. Mr. Cerri was not arrested on that evening. As an undercover agent involved in an ongoing covert operation, McKenzie admitted he was not performing an administrative inspection of Mr. Cerri's licensed business premises to verify compliance with the civil reporting provisions of the federal firearms statute. With these essential facts, the Seventh Circuit's coloring this case as one involving an administrative search of a "licensed premises" is without factual basis.

Of the constitutionally recognized exceptions to the warrant requirement,[2] in one specific administrative area warrantless search inspections have been authorized by Congress. Title 18, § 923(g) is such an enactment which authorizes by statute warrantless searches of federally licensed gun dealerships. In this area statutory authority is the equivalent of a valid search warrant. (*United States* v. *Petrucci*, 486 F.2d 329, 332 (9th Cir. 1973)). However, the congressional power to authorize warrantless searches by statute must comport with the Constitution. Accordingly, searches conducted pursuant to § 923(g) are specifically and carefully restricted to comply with Fourth Amendment standards. *United States* v. *Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972). Congressional enactments such as § 923(g) do not declare a "field day" for the Department of Alcohol, Tobacco and Firearms in searching gun dealerships,

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[2] The more well known constitutionally recognized exceptions to the search warrant requirement are: (1) searches of motor vehicles, *Carroll* v. *United States*, 267 U.S. 132 (1925); (2) searches incident to detentions: (a) arrest, *Chimel* v. *California*, 395 U.S. 752 (1969); and (b) field investigatory stops ("stop and frisk"), *Terry* v. *Ohio*, 392 U.S. 1 (1968); (3) searches in direct pursuit of fleeing suspects, *Warden* v. *Hayden*, 387 U.S. 294 (1967); (4) consent searches, *Schneckloth* v. *Bustamonte*, 412 U.S. 219 (1973); inventory searches, *Cady* v. *Dombrowski*, 413 U.S. 433 (1973).

and by no means does the provision make it "open season" on federally registered licensed gun dealers.[3]

This provision, 18 U.S.C. § 923(g), is limited. It is restricted. It merely:

> . . . authorizes the Secretary of the Treasury to inspect and examine during business hours the records required of licensed dealers . . .
>
> * * *
>
> . . . the statute authorizes the Secretary to transmit evidentiary information acquired from the search to law enforcement officers.

(See, *United States* v. *Cooper*, 409 F.2d 364 at 368, (Middle Dist.Fl. 1976)).

For the Seventh Circuit to rule as it has that "certitude" authorizes non-consensual, warrantless police search and seizure of a firearm dealer's inventory and records at night, from that person's home—not the premises of his dealership and not during business hours—is the penultimate emasculation of the Fourth Amendment. No such Fourth Amendment exception nor use of the firearms statute was intended by Congress and no such application of § 923(g) has ever been made by a court of law. The United States Supreme Court's interpretation of § 923(g), as one narrow exception to the warrant requirement, has never given unbridled, uncontrolled power to federal officials to ignore the Fourth Amendment. Clearly, no act of Congress can authorize a violation of

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[3] For instance, in analyzing cases involving the search of automobiles without a warrant, which bring into play the often used "automobile exception" to the warrant requirement the Supreme Court has warned: "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." (*Coolidge* v. *New Hampshire*, 403 U.S. 443 at 461, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). Such searches, still, must be reasonably justified and based upon probable cause, according to Fourth Amendment standards.

the Constitution. (*Almeida-Sanchez* v. *United States*, 403 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596, 600-602 (1973)). The *Biswell* opinion commences with a statement of the limits of the provision in question:

> "The Gun Control Act of 1968, 82 Stat. 1213, 18 U.S.C. § 921 *et seq.*, authorizes official entry during business hours into the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any record or documents required to be kept and any (2) firearms or ammunition kept or stored by such . . . dealer . . . at such premises. 18 U.S.C. § 923(g)." (*United States* v. *Biswell*, 406 U.S. at 311-312)

Thus, 18 U.S.C. 923(g) only gives statutory authority in certain, specific, controlled circumstances for official inspection of records and inventory of firearm dealers during normal business hours at licensed business premises. For the Seventh Circuit to hold that this provision and case law interpreting it (*United States* v. *Sherer*, 523 F.2d 371, 375 (7th Cir. 1975); *United States* v. *Currier*, 621 F.2d 7, 9 (1st Cir. 1980)) cited by the Court, renders the Fourth Amendment nonexistent as to licensed firearm dealers shows a clear decision to reject and ignore the limits of statutorily authorized administrative searches which, in every case, must comply with the Constitution. No court or statutory provision can give plenary investigative power to law enforcement and withstand constitutional mandate. *United States* v. *Biswell*, 406 U.S. 311 (1972) provides no authority for such a conclusion.

Finally, the Seventh Circuit's hard-faced characterization of Mr. Cerri's Fourth Amendment constitutional claim as "frivolous" because he is not innocent[4] is difficult to understand. It is nearly impossible to accept. Such a rejection of

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[4] "Cerri's further argument that Section 923(g) is inapplicable when the inspecting agents suspect criminal conduct is frivolous, implying as it does that the law abiding have fewer rights

(footnote continued on next page)

important constitutional issues on the basis of guilt or innocence is too banal.

It has been held that the right to conduct official administrative compliance inspections cannot be abused by federal criminal investigations. In *United States* v. *Russo*, 517 F.Supp. 83 (E.D.Mich. 1981), the court ruled where evidence affirmatively establishes that officers believe a criminal violation has occurred, and that an agent's own admission of the seizure of records was not relevant to seeking civil compliance or mere inspection of records to determine compliance with civil reporting procedures, and that, in fact, the officers desired access to gather evidence for a possible prosecution, the law enforcement officers are therefore obligated to obtain a warrant upon a traditional showing of probable cause applicable to searches for evidence of a crime. (*Michigan* v. *Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)) In this case, even assuming that from the pre-January 22, 1982 events of November 1981 and December 17, 1981, that officer McKenzie had grounds to believe David Cerri was involved in criminal activity (outside his licensed premises), this necessitated application for a search warrant on traditional principles of probable cause prior to McKenzie's search and seizure of evidence from the defendant's home. The inspection provision, 18 U.S.C. § 923(g) cannot and do not authorize nor justify a sweeping investigation, a covert operation to seek evidence of criminal activity.

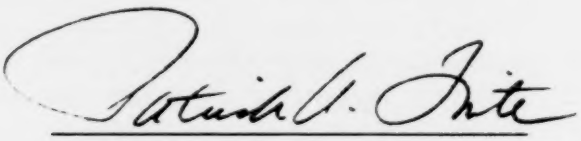
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than criminals. See *United States* v. *Wilbur, supra*, 545 F.2d at 766." (See Opinion page 4).

CONCLUSION

Accordingly, David Cerri respectfully requests that a writ of certiorari issue to the Seventh Circuit Court of Appeals.

Respectfully submitted,



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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1564

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID CERRI,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 CR 206—**John A. Nordberg**, *Judge.*

ARGUED SEPTEMBER 17, 1984—DECIDED JANUARY 11, 1985

Before BAUER and POSNER, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

POSNER, *Circuit Judge.* David Cerri was charged with federal firearms violations. After his motions to dismiss the indictment and to suppress evidence consisting of guns seized from his home were denied, he entered a plea of guilty under Fed. R. Crim. P. 11(a)(2) to two of the counts of the indictment, conditional on the failure of his appeal from the denial of his two motions. He was sentenced to a year and a day in prison, five years of probation, and a $1,000 fine.

The only witness at the suppression hearing was McKenzie, an undercover agent with the Treasury Department's Bureau of Alcohol, Tobacco and Firearms. He had been introduced to Cerri in a bar, where he had

* Hon. William J. Campbell of the Northern District of Illinois, sitting by designation.

bought two pistols from him without displaying a firearm owner's identification card or filling out any of the forms required by federal or state law. He took delivery of the guns from Cerri's car. Cerri told McKenzie that he was a federally licensed gun dealer and in future transactions something would have to be done about forms. McKenzie said he would not sign anything, because he didn't want the guns traced back to him, and that he didn't have and wouldn't get a firearm owner's identification card in his own name (in fact McKenzie did have such a card) but could get one from "a black guy" (McKenzie is white). That would be "great," said Cerri. A month later McKenzie called Cerri and told him he had gotten the card and wanted to buy more guns. Cerri invited him to his home and there sold him seven pistols, filling out the required information on the federal forms from the false firearm owner's identification card that McKenzie showed him and that had a photograph of a black man. Cerri signed the forms himself in the name of the mythical black man, since McKenzie refused to sign.

A month later McKenzie again came to Cerri's home to buy guns. Cerri offered to sell him 39 guns and quoted prices on each of them. McKenzie left on the pretext of going to his car to get money for the purchase and a list of the people he did business with, and Cerri said he would leave the door unlocked for his return. McKenzie returned shortly, all right—but with a raiding party of federal officers who, without a search warrant, went through Cerri's house, seized all the guns and business records found there, and took them away but did not arrest him. Cerri all this time was a federally licensed firearms dealer but his home was not the place of business listed on his license.

If McKenzie had seized guns and records in plain view in the part of the house to which Cerri had admitted him (the living room), no warrant would have been required; the agent would have been lawfully in a place in which evidence of crime was in plain view. Nor would it make a difference that for his own safety he seized the evidence

with the assistance of other officers whom he brought with him, without Cerri's consent. *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983). But the guns and records were in other rooms and no emergency required that those rooms be searched before a warrant could be obtained.

The only possible legal basis for the search is a statute dealing with inspection of the business premises of federally licensed firearm dealers, 18 U.S.C. § 923(g). After requiring that "each licensed importer, licensed manufacturer, licensed dealer, and licensed collector" maintain certain records "at such place, for such period, and in such form as the Secretary [of the Treasury] may by regulations prescribe" and that the importers, etc. "shall make such records available for inspection at all reasonable times," the statute authorizes the Secretary to "enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored . . . at such premises." The Supreme Court held in *United States v. Biswell*, 406 U.S. 311 (1972), that this statute does not violate the Fourth Amendment.

The novelty here—we have found no similar case—is that the premises that the federal agents entered were not the premises from which the dealer was licensed to deal, but were instead the dealer's home. A man does not, simply by going into business as a gun dealer, so far surrender his privacy that government agents can barge into his home at will on the off chance that he might be storing some of his guns or business records there. But on the other hand a gun dealer cannot escape the net of section 923(g) simply by moving his premises to a place different from the address on his license. See *United States v. Scherer*, 523 F.2d 371, 375 (7th Cir. 1975); *United States v. Currier*, 621 F.2d 7, 9 (1st Cir. 1980). If Cerri had moved his gun shop from 10 Main Street to 12 Main Street he would not be heard to argue that federal agents could not enter his new premises during business hours and

inspect his guns and records without a warrant. The statute would be too easily evaded if such an argument were accepted.

What Cerri actually did was close enough to this hypothetical example to be controlled by it. He conducted his gun business not (or not exclusively) out of his licensed premises but instead out of his car and his home, and by doing so turned the car and the home into premises for selling guns. This made them places to which government agents had a right of access under the authority of section 923(g)—only during business hours, it is true, but the authority was exercised during Cerri's business hours: indeed, while he was in the midst of conducting busi[illegible]s.

It cannot make a difference that Cerri chose to use his *home* as an alternative premises for engaging in the business of a gun dealer. When used as a place of business, the home has the same status under the Fourth Amendment as any other place of business. See *Lewis v. United States*, 385 U.S. 206, 211 (1966). And it cannot make a difference that the agents seized the records and guns rather than merely inspecting them. It was lawful for the agents to inspect the records and guns, and once they inspected them they knew from what McKenzie had told them that the records and the guns were evidence of crime, which being in plain view could be seized lawfully without a warrant. See *United States v. Biswell*, *supra*, 406 U.S. at 312, 317; *United States v. Wilbur*, 545 F.2d 764, 765 (1st Cir. 1976); *United States v. Petrucci*, 486 F.2d 329, 332 (9th Cir. 1973). Cerri's further argument that section 923(g) is inapplicable when the inspecting agents suspect criminal conduct is frivolous, implying as it does that the law abiding have fewer rights than criminals. See *United States v. Wilbur*, *supra*, 545 F.2d at 766.

The only thing that gives us slight pause is the question how much certitude the agents must have that the premises they are entering, though not listed on the dealer's license as his place of business, really are such. If probable cause to believe that they are business premises is ground enough for federal agents to enter a gun dealer's

home without a warrant, then section 923(g) makes even greater inroads into the privacy of people engaged in the gun business than the Supreme Court thought in *Biswell*. We know from cases like *United States v. Karo*, 104 S. Ct. 3296, 3303 (1984), and *Payton v. New York*, 445 U.S. 573, 589-90 (1980), that the search of a home without a warrant violates the Fourth Amendment, even if the search is otherwise reasonable, unless there is consent, or an emergency that makes it impossible to get a warrant; and neither exception to the requirement of a warrant was present here. McKenzie had consent to be in the living room—not to search the whole house. Maybe the sale of guns is so menacing to the public safety that Congress may compromise the principle of these cases, but it is not clear that it has tried to do this in section 923(g) or that the Fourth Amendment would allow it to succeed. But these are not questions we need answer in this case. McKenzie knew—he did not merely suspect—that Cerri was selling guns from his home (and doing so at the very moment when the agents entered)—knew with as much certainty as he knew the address on Cerri's license.

So we think the search and the seizure were lawful and move on to the sufficiency of the indictment. Cerri says it was not clear enough to apprise him of the crime with which he was charged. This point is frivolous but there is a little more merit to his contention that the second count to which he (conditionally) pleaded guilty (Count 12) did not charge an offense. Section 922(b)(2) of the Criminal Code, on which this count is based, makes it a crime "for any licensed dealer . . . to sell . . . any firearm or ammunition to any person in any state where the purchase or possession by such person of such firearm or ammunition would be in violation of any State law . . . ." Illinois law forbids the transfer of firearms to any person who does not display a firearm owner's identification card previously issued in his own name, Ill. Rev. Stat. 1981, ch. 38, ¶ 83-3(a), while attempted violations of paragraph 83-3(a) are forbidden by the state's general attempt statute, Ill. Rev. Stat. 1981, ch. 38, ¶ 8-4. Count 12 charges that Cerri "did knowingly sell and deliver" to McKenzie the 39

pistols that Cerri offered McKenzie on McKenzie's second visit to his home, in violation of the two sections of the Illinois firearms statute just cited, the violation consisting of Cerri's having "knowingly transferred and caused to be transferred and attempted to transfer" the 39 pistols to McKenzie, who did not "display" a valid firearm owner's identification card issued in his name.

Cerri points out that a gun purchaser like McKenzie who has a valid firearm owner's identification card in his own name but does not display it commits no crime under Illinois law, and Cerri argues from this that he could not have violated 18 U.S.C. § 922(b)(2) since McKenzie's "purchase" did not violate Illinois law. But this argument is a *non sequitur*. The sale was illegal under paragraph 83-3(a) of the Illinois gun law because the card was not displayed, and therefore the purchase was also illegal. Sale and purchase are the same transaction looked at from the seller's and the buyer's side, respectively. It is true that Illinois law visits criminal sanctions for the illegal sale (or purchase) just on the seller. But it is common for statutes that punish trafficking in particular goods, such as narcotics or liquor or sex, to reserve criminal penalties for the dealer, regarding the purchaser as more victim than accomplice. See Perkins & Boyce, Criminal Law 734 (3d ed. 1982). The point is not that the purchase is not wrong; the purchase is wrong if the sale is wrong; the point is that the purchaser is a much lesser wrongdoer than the seller—maybe no wrongdoer.

Cerri also argues that in charging that his transaction with McKenzie violated the Illinois attempt statute, Count 12 charges no crime under 18 U.S.C. § 922(b)(2). It is true that section 922(b)(2) does not punish attempted sales of firearms, but since Count 12 charges that the sale was completed, the reference to attempt can be disregarded as harmless surplusage. See, e.g., *United States v. Greene*, 497 F.2d 1068, 1086 (7th Cir. 1974).

Cerri's last argument is that no completed sale was made, since McKenzie's raiding party interrupted the transaction before the guns were handed over to

McKenzie or paid for. The case is in the wrong procedural posture for him to make such an argument. All that is before us is the lawfulness of the search and the sufficiency of the indictment, and Cerri cannot use evidence from the suppression hearing to argue that he did not commit the offense charged in the indictment. He pleaded guilty to Count 12, conditional only on the failure of his appeal from the district court's refusal to suppress evidence or dismiss the indictment; he has waived his right to contest the sufficiency of the government's evidence that he sold the 39 pistols to McKenzie.

Yet it does appear from the transcript of the hearing on the conditional guilty plea that the facts are as testified to in the suppression hearing: the guns were not handed over. And if we thought this meant that Cerri had pleaded guilty to an offense he could not have committed, we would hesitate to conclude that he had waived his right to complain. But we do not think it means this. From the evidence presented in the plea hearing it appears that the sale may have been completed in Cerri's home, before McKenzie left, ostensibly to get money to pay for the guns and a list of his customers (to find out how many more guns he might need) though actually to get the raiding party. Section 922(b)(2) punishes sale or delivery. The sale can be executory, and thus precede payment and delivery. There was a factual basis for concluding that this is what happened here; no more was necessary. See Fed. R. Crim. P. 11(f).

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—1-11-85—450

APPENDIX B

In the

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID CERRI,

Defendant.

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83 CR 206—**Judge Nordberg**

MEMORANDUM OPINION AND ORDER

Defendant has moved to suppress evidence he alleges was illegally seized from his home on January 22, 1983 by agents from the Department of Alcohol, Tobacco and Firearms ("AFT"). An evidentiary hearing was held on the motion on October 14, 1983, at which AFT Agent Ronald McKenzie was the only witness. The court found Agent McKenzie to be a highly credible witness. At the hearing the following facts were established:

The defendant is a federally licensed firearms dealer. On November 13, 1981 and December 15, 1981, defendant sold to undercover agent McKenzie a total of nine firearms. The defendant explained on both occasions that he was a federally licensed firearms dealer and that McKenzie would have to obtain an Illinois Firearms Owner's Identification ("FOID") Card in someone's name before a sale could be

completed. The agent never produced a valid FOID card in his own name. He told the defendant that the guns he wished to purchase would be resold in Missouri and would be used to commit violent crimes. He therefore did not want the guns to be traceable back to him. Agent McKenzie, a white male, then obtained an FOID card with a picture and description of a black man. This card was used by the defendant for the records he was required to keep for the transactions under the Gun Control Act, 18 U.S.C. § 921 *et seq.*

On January 22, 1983, the defendant contacted Agent McKenzie and told him that a new shipment of guns was available. They met at the defendant's residence at 6:00 p.m. that evening to negotiate a sale. After McKenzie entered the defendant's home, the defendant showed him an invoice describing 39 guns available for sale to him. McKenzie told the defendant that he would need to refer to a list in his car to determine what guns he should purchase. As McKenzie left to go to his car, Cerri told him to leave the door open and to let himself back in. McKenzie returned in a few moments, identified himself as an AFT agent, and then seized records and the 39 guns described on the invoice.

The defendant has moved to suppress this evidence, alleging that the seizure conducted without a warrant violated defendant's Fourth Amendment rights. The government contends that the search of defendant's home without a warrant was permissible under 18 U.S.C. § 923.

Section 923 requires each licensed gun dealer to maintain and make available for inspection certain records of gun transactions, and it permits AFT agents to "enter during business hours the premises (including places of storage) of any firearms or ammunition dealer . . . for the purpose of inspecting and examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored . . . at such premises."

The sale of firearms by federally licensed dealers is a highly regulated industry. In upholding the constitutionality of § 923(g), the Supreme Court has found that federally

licensed gun dealers have only a limited expectation of privacy when they choose to engage in this pervasively regulated business. *United States* v. *Biswell*, 406 U.S. 311, 92 S.Ct. 1593 (1972). The Court in *Biswell* stated that the highly regulated nature of the firearms business and the gun dealer's corresponding decreased expectation of a privacy make warrantless, surprise searches permissible under the Fourth Amendment. The court noted:

> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. 18 U.S.C. § 921 (a)(19). The dealer is not left to wonder about the purposes of the inspector or the limits of his task.

The court concluded that inspections made pursuant to a statute such as § 923 without a warrant do not violate the Fourth Amendment.

Thus, defendant's general contention that warrantless searches conducted under authority of § 923 violate the Fourth Amendment has been squarely rejected by the Supreme Court and is without merit.

Defendant has also raised three specific arguments for finding that the warrantless search conducted in this case is not authorized under § 923. First, the defendant asserts that because the search and seizure was at the defendant's home, § 923 is not applicable. Defendant argues that § 923 permits only searches of defendant's licensed business premises, and that his licensed business premises was at 4604 N. Ozark Ave., Norridge, Illinois, not at his home.

The evidence presented at the hearing established, however, that the defendant invited Agent McKenzie into his home to transact illegal business, and that the defendant

stored both his business records and firearms in his home. When a home is converted into a commercial center into which outsiders are invited for the purpose of transacting illegal business, the home is treated as a business center for purposes of Fouth Amendment protection. *Lewis* v. *United States*, 385 U.S. 206, 211 (1966); *United States* v. *Davis*, 646 F.2d 1298, 1301 (8th Cir.), *cert. denied*, 454 U.S. 868 (1981); *United States* v. *Ressler*, 536 F.2d 208, 212 (7th Cir. 1976). By inviting Agent McKenzie into his home for the purpose of selling guns, believing that the agent did not have the necessary FOID card, and believing that the guns would be sold to be used to commit crimes, the defendant lost the protections normally afforded to an individual's home under the Fourth Amendment, and converted his home into his business premises for purposes of § 923. To hold otherwise would allow the defendant to evade federal laws governing the sale of firearms by operating his firearms business out of his home, a result obviously not intended by Congress. The court therefore concludes that defendant's home in this case falls within the term "business premises" for purposes of § 923.

The second argument advanced by defendant is that the government's seaich and seizure is not authorized under § 923 because it was not conducted during regular business as required in the statute. Defendant's argument is without merit for two reasons. First, on defendant's application to become a federally licensed firearms dealer (Government Exhibit 2), he stated that his business hours were from 12:00 p.m. until 8:00 p.m. daily. No evidence was introduced by the defendant to show that these were not in fact defendant's business hours. Since the seizure took place at 6:00 p.m., it was obviously within thesse specified business hours. Moreover, since it was apparent that the defendant was attempting to transact business at the time of the seizure, it is fair to presume that the seizure was made during "business hours". Defendant's argument that the seizure was not made during regular business hours is therefore without merit.

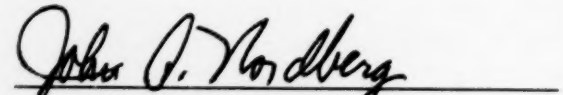
Finally, defendant argues that because Agent McKenzie was operating "under cover" with the apparent purpose of

conducting a criminal investigation, instead of for the purpose of making a "routine civil compliance check," § 923 does not provide authority for his inspection and seizure. However, § 923 has been broadly construed to allow effective regulation of the firearms industry, and the use of § 923 for criminal investigations has been approved by the Supreme Court in *United States* v. *Biswell*, 406 U.S. 311, 92 S.Ct. 1593 (1972). In *United States* v. *Wilbur*, 545 F.2d 764 (1st Cir. 1976), the court approved an inspection and seizure even after an indictment had been returned and while an arrest warrant for the defendant was outstanding. The *Wilbur* court noted that the Supreme Court in *Biswell* approved warrantless inspection searches under § 923 in broad terms, and that a rule allowing federal agents to conduct warrantless searches only until their suspicions were aroused would make little sense.

This court concurs in the reasoning of the *Wilbur* court, and will not write into § 923 a limitation permitting use of the statute only for "routine civil compliance inspections". The court therefore rejects defendant's argument that § 923 does not authorize the search without a warrant of defendant's home because it was conducted as part of a criminal investigation.

Accordingly, the court finds that the inspection and seizure of records and firearms from the defendant was authorized under § 923, and that the seizure did not violate the defendant's Fourth Amendment rights. Defendant's motion to suppress is therefore denied.

ENTER:



JOHN A. NORDBERG
District Judge

Dated: November 18, 1983